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No.

Supreme Court, U. S.
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# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1980

CITIZENS AGAINST RENT CONTROL/COALITION FOR FAIR HOUSING, an unincorporated association; MASON-McDUFFIE, a California corporation; BERKELEY BOARD OF REALTORS, a California nonprofit association; BETTY GERITZ; MURIEL ROSENKRANZ and EVA FLOYSTRUP,

*Appellants,*

vs.

CITY OF BERKELEY, CALIFORNIA, a municipal corporation; THE BERKELEY CITY COUNCIL; THE BERKELEY FAIR CAMPAIGN PRACTICES COMMISSION; PATRICIA DEVITO, BETTY BENNETT, MERLIN EDWARDS, JOHN CHASEN, THOMAS DONOVAN, FAITH OTIS, SANDY MILLER, DAVID B. ROSENTHAL, as members of the Berkeley Fair Campaign Practices Commission,

*Appellees.*

**On Appeal from the Supreme Court of the State of California**

## JURISDICTIONAL STATEMENT

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## QUESTIONS PRESENTED FOR REVIEW

1. Do the Provisions of a Berkeley Ordinance Limiting the Amount of Contributions to a Campaign Committee Supporting or Opposing a Ballot Measure in an Election Campaign Violate the First and Fourteenth Amendments to the United States Constitution?

2. Is There Any Interest So Compelling as to Warrant the Contribution Limit's Admitted Infringement on Appellants' First Amendment Rights of Speech and Association?

3. Can the Ordinance Be Upheld if Berkeley Has Failed to Meet Its Burden of Proving the Existence of a Compelling Governmental Interest?

## PARTIES TO THIS APPEAL

Appellants Citizens Against Rent Control/Coalition for Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California non-profit association; Betty Geritz, Muriel Rosenkranz and Eva Floystrup were plaintiffs and appellees in the courts below. Appellees City of Berkeley, California, a municipal corporation; the Berkeley City Council; the Berkeley Fair Campaign Practices Commission; Patricia Devito, Betty Bennett, Merlin Edwards, John Chasen, Thomas Donovan, Faith Otis, Sandy Miller, David B. Rosenthal, as members of the Berkeley Fair Campaign Practices Commission, were defendants and appellants in the courts below. There were no other parties.

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*Appellees.*

**On Appeal from the Supreme Court of the State of California**

## JURISDICTIONAL STATEMENT

Appellants Citizens Against Rent Control/Coalition For Fair Housing, an unincorporated association; Mason-McDuffie, a California corporation; Berkeley Board of Realtors, a California nonprofit association; Betty Geritz;

Muriel Rosenkranz and Eva Floystrup, submit their Jurisdictional Statement and respectfully request that probable jurisdiction be noted.

## OPINIONS BELOW

The opinion of the California Supreme Court is cited as *Citizens Against Rent Control v. City of Berkeley*, 27 Cal. 3d 819, 614 P.2d 742, 167 Cal.Rptr. 84 (1980). The opinion appears as Appendix A.

The opinion of the California Court of Appeal, was cited (until vacated) as *Citizens Against Rent Control v. City of Berkeley*, 99 Cal.App.3d 736, 160 Cal.Rptr. 448 (1979). The opinion appears as Appendix B.

## JURISDICTIONAL BASIS

(i) Appellants filed for declaratory and injunctive relief in the Superior Court in and for the County of Alameda, State of California. The complaint challenged the validity, under the First Amendment of the Federal Constitution, of section 602 of the Berkeley Election Reform Act of 1974, Berkeley, Cal. Ordinance 4700-N.S. (June 4, 1974) ("the Ordinance"),[1] which limited to $250 the amount of contributions to campaign committees supporting or opposing measures on the Berkeley municipal ballot. The Superior Court issued a temporary restraining order and later, a preliminary injunction against enforcement of section 602 of the Ordinance. The Superior Court granted summary judgment for appellants holding section 602 unconstitutional.[2] The California Court of Appeal, First Appellate

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[1]Unless otherwise indicated, all references to "sections" are to sections of the Ordinance; the Ordinance appears as Appendix F.

[2]The Order Granting Summary Judgment, the Judgment, and the Notice of Entry of Judgment appear as Appendices C, D and E, respectively.

District, Division Two, unanimously affirmed the trial court. The California Supreme Court, in a 4 to 3 decision, reversed the courts below and sustained the validity of section 602 against appellants' constitutional attack.

(ii) The judgment of the California Supreme Court was rendered on August 7, 1980. Appellants filed their Notice of Appeal in the California Supreme Court on October 28, 1980.[3]

(iii) This Court has jurisdiction of this appeal under 28 U.S.C. § 1257(2) (1976), which provides for an appeal from a final judgment of a state's highest court "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . and the decision is in favor of its validity." Section 1257(2) applies where a municipal ordinance has been declared constitutional by a state's highest court. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 207, n. 3 (1975); *King Mfg. Co. v. City Council of Augusta,* 277 U.S. 100 (1928); *Coates v. City of Cincinnati,* 402 U.S. 611, 612 (1971).

## RELEVANT CONSTITUTIONAL PROVISIONS AND SECTIONS OF THE ORDINANCE

The relevant constitutional provision is the First Amendment to the Constitution of the United States:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Relevant portions of the Berkeley Ordinance are:

> Section 602: No person shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person

[3] A copy of the Notice of Appeal appears as Appendix I.

with respect to a single election in support of or in opposition to a measure to exceed two hundred and fifty dollars ($250).

Section 219: "Persons" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

Section 217: "Measure" means any City Charter amendment, ordinance or other proposition submitted to a popular vote at an election, whether by initiative, referendum or recall procedure or otherwise, or circulated for the purposes of submission to a popular vote at any election, whether or not the proposition qualifies for the ballot.

Section 604: If any person is found guilty of violating the terms of this chapter, each campaign treasurer who received part or all of the contribution or contributions which constitute the violation shall pay promptly, from available campaign funds, if any, the amount received from such persons in excess of the amount permitted by this chapter to the City Auditor for deposit in the General fund of the City.

Section 700: Any person who knowingly or willfully violates any provision of this ordinance is guilty of a misdeameanor punishable by a fine for each violation of three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received.

## STATEMENT OF THE CASE

Appellants contend that section 602 is unconstitutional on its face, impermissibly violates appellants' fundamental rights of speech and association, is not supported by any

compelling governmental interest, and that no such interest was demonstrated by the City of Berkeley. Appellants raised these contentions at each stage of the proceedings below: in their verified complaint; in their pleadings in support of their applications for temporary restraining order and preliminary injunction (successfully); in their pleadings in support of their motion for summary judgment (successfully); and in their briefs before the California Court of Appeal (successfully) and the California Supreme Court (unsuccessfully).

The Ordinance was enacted in 1974. At the April 19, 1977 Berkeley Municipal election, Berkeley voters were asked to vote on a complex ballot measure, Measure B, which would have imposed a strict system of rent controls upon thousands of rental units in Berkeley. The issue was controversial and groups of citizens formed to support and oppose Measure B. Many citizens formed an unincorporated association (campaign committee) under Berkeley and California law, to oppose the passage of Measure B; they called themselves Citizens Against Rent Control ("CARC") and are appellants in this case. CARC solicited and accepted campaign contributions, hired an experienced campaign manager, published campaign literature and generally conducted an active campaign against Measure B. Supporters of Measure B also conducted an active campaign.

More than a month before the election, a controversy arose concerning Berkeley's intent to enforce the contribution limit contained in section 602. CARC believed that the City advised campaign committees that it was not going to enforce section 602, and relying on that belief, CARC solicited and received a total of $18,600 in contributions above the $250 limit from numerous "persons" including appellants Mason-McDuffie and the Berkeley Board of

Realtors. A week before the election, appellee The Berkeley Fair Campaign Practices Commission, ordered CARC immediately to surrender the $18,600 to the City treasury, pursuant to section 604 of the Ordinance. Appellants, faced with the loss of badly-needed funds at the most crucial juncture of an important election campaign, filed suit for injunctive and declaratory relief, obtained a temporary restraining order against enforcement of sections 602 and 604, and utilized the $18,600 during the last days of their election campaign. The measure was defeated. Appellants, faced with an $8,000 post-election campaign debt, amended their complaint below to seek the right to collect amounts greater than $250 to retire the debt after the election.

Appellants submitted evidence below, in the form of affidavits and declarations, that the $18,600 was necessary to conduct an effective campaign against Measure B; that CARC solicited and received contributions in excess of $250 including contributions from certain other appellants; that other persons and entities desired to contribute more than $250 to CARC but were reluctant to do so because of the restrictions imposed by section 602; that to wage an effective campaign against the complex rent control measure, expensive research and voter contact had to be achieved; and that a professional campaign manager had to be hired and paid.

The only evidence submitted by appellees at any stage of the proceedings below, was the declaration of Edythe Campbell, Berkeley City Clerk.[4] This declaration merely states that appellee, The Berkeley Fair Campaign Practices Commission, had demanded that CARC surrender the $18,600. It contains no proof or offer of proof of any compelling governmental interest to justify section 602.

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[4]The Campbell Declaration appears as Appendix G.

## STATEMENT OF THE REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY CONSIDERATION BY THIS COURT:

### THE ORDINANCE ILLEGALLY RESTRAINS SPEECH AND ASSOCIATION IN AN ELECTION CAMPAIGN, AND THE DECISION OF THE CALIFORNIA SUPREME COURT DIRECTLY CONFLICTS WITH A JULY 11, 1980 DECISION OF THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

This case involves important questions concerning the power of state and local governments to limit contributions by individuals and associations to campaign committees supporting or opposing ballot measures. The California Supreme Court has sustained the validity of an ordinance of the City of Berkeley which limits such contributions. That decision violates the First and Fourteenth Amendments to the Federal Constitution. Although this is the first time this precise issue is before this Court, the California decision is contrary to the principles of prior decisions of this Court and is in direct conflict with an opinion of the United States Court of Appeals for the Fifth Circuit.

The issue presented by this case is of widespread significance because numerous local governments have enacted similar laws. It is particularly important that this Court undertake full consideration of this appeal because such laws affect and impermissibly restrain the exercise of fundamental constitutional rights of citizens throughout the country.

Section 602 specifically prohibits individuals or associations of persons from contributing more than $250 to a campaign committee for or against a measure on the Berkeley municipal ballot. During the past five years, this

Court has addressed related questions involving the propriety of governmental restrictions on citizens' rights to participate in the political process by making independent monetary expenditures or contributions to campaign committees. *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978); *Buckley v. Valeo,* 424 U.S. 1 (1976). Those decisions invalidated restrictions on direct expenditures with respect to either candidate or issue-related elections, but upheld limitations on contributions to candidates and candidate's committees. *Buckley, Bellotti* and earlier decisions of this Court provide considerable guidance and a basis for analysis of the validity of section 602.

### 1. Section 602 Infringes Upon First Amendment Rights of Speech and Association

First Amendment protection extends to political activity, including the discussion of candidates, ballot measures and issues, the form and operation of government and all matters relating to the political processes. *Mills v. Alabama,* 384 U.S. 214 (1966). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964); *see also Buckley v. Valeo,* 424 U.S. at 14.

It is now a well established constitutional principle that regulation of campaign contributions and expenditures necessarily affects the exercise of the First Amendment right of freedom of speech. To conduct a political campaign requires money to pay for research, media and other organizational and communication expenses.

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience

> reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

*Buckley v. Valeo*, 424 U.S. at 19 (footnote omitted).

The utilization of funds in conducting campaigns or expressing political beliefs is protected by the First Amendment. "[I]t is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.' " *First National Bank of Boston v. Bellotti*, 435 U.S. at 786, n. 23 (citations omitted). Campaign contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities." *Buckley v. Valeo*, 424 U.S. at 14.

Section 602's contribution limits also infringe on protected associational freedoms. *Buckley v. Valeo*, 424 U.S. at 22. The right to freedom of association was recognized as a separate and distinct constitutional right in *NAACP v. Alabama*, 357 U.S. 449 (1958). This right has become increasingly important in modern times when in order to have an effective voice, individuals or groups of people frequently find it necessary to join with others to express mutual concerns and to pursue common goals. As stated in *NAACP v. Alabama*, 357 U.S. at 460, "[e]ffective advocacy of both public and private points of view,

particularly controversial ones, is undeniably enhanced by group association. . . ."

A fundamental component of freedom of association is the right to advocate in a group, political and governmental beliefs and ideas. *Healy v. James,* 408 U.S. 169 (1972). This right to join together to advance political causes includes the right to associate in order to assert legal and economic interests. *NAACP v. Button,* 371 U.S. 415 (1963). "[F]reedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Kusper v. Pontikes,* 414 U.S. 51, 56-57 (1973).

A most important function of a campaign committee such as CARC is to permit persons to associate and pool their resources through monetary contributions. This is particularly significant in a ballot measure campaign, where there is no candidate to speak out and focus attention on the issue and the only voice that can be heard is that of an effective campaign committee. By forcing persons to spend any sums in excess of $250 totally independently of any organized campaign and independently of each other, section 602 restrains those persons from acting in concert to engage in vital campaign activities including the conduct of coordinated research, discussion of campaign strategy, polling of voters, coordination of mailings to voters, purchase of political advertisements and media messages, hiring of skilled campaign management and the solicitation of others to contribute funds.

Section 602 limits associational rights and has the effect of prohibiting those who do not have vast wealth from effectively advocating their views in the only way available, by joining together and pooling their resources. Paradoxically, the limitation has the effect of bestowing political

advantage upon very wealthy persons or corporations or unions who do not need to associate with others to campaign effectively, and who may make unlimited independent expenditures and conduct a campaign by themselves. *See Pacific Gas and Electric v. City of Berkeley,* 60 Cal.App. 3d 123, 131 Cal.Rptr. 350 (1976). Thus, section 602 reduces the political effectiveness of the large majority of individuals and small entities which must aggregate their resources to have their message heard.

**2. Section 602 Must Be Viewed With Strict Scrutiny; the Government Has the Burden To Establish Its Validity**

Where, as here, an enactment affects fundamental rights of speech and association, the Ordinance is subject to the "closest scrutiny." *Buckley v. Valeo,* 424 U.S. at 25 (quoting *NAACP v. Alabama,* 357 U.S. at 460-61); *accord, First National Bank of Boston v. Bellotti,* 435 U.S. at 786.

Whenever limitations are placed upon First Amendment rights, particularly those involving speech and political association, the government may prevail only upon a convincing demonstration of a compelling governmental interest. *NAACP v. Button,* 371 U.S. at 438-39. Furthermore, "the burden is on the government to show the existence of such an interest." *Elrod v. Burns,* 427 U.S. 347, 362 (1976). "Even then the State must employ means 'closely drawn to avoid unnecessary abridgment . . . .'" *First National Bank of Boston v. Bellotti,* 435 U.S. at 786 (quoting *Buckley v. Valeo,* 424 U.S. at 25).

The City of Berkeley submitted no evidence whatsoever to meet its burden to establish the existence of a compelling governmental interest to support the contribution limit. Nevertheless, the California Supreme Court upheld section 602, relying upon "political scientists" and "commentators" as opposed to anything in the record below.

### 3. The Opinion of the California Supreme Court Conflicts With Prior Decisions of This Court

The slim majority of the California Supreme Court articulated the following rationale for upholding section 602: "We hold above that large contributons to a local ballot measure campaign threaten our electoral system and potentially pervert the purpose of initiative procedures; . . ." *Citizens Against Rent Control v. City of Berkeley,* 27 Cal. 3d at 831; *see* Appendix A at 17.

Without any evidence whatever, the Court below theorized that large contributions potentially pervert the referendum process, *Id.* at 826, Appendix A at 9, that the domination of the referendum processes by large contributors leaves other citizens with "stilled voices," *Id.* at 826-27, Appendix A at 9-10, and that large contributors thwart the intended purpose of the referendum when they "use the power of the purse to overcome the power of reason." *Id.* at 827, Appendix A at 10.

In a cogent dissent joined by two other justices below, Justice Frank Richardson stated:

> My colleagues of the majority urge a theory that public confidence in the electoral processes is undermined by permitting unrestricted contributions in ballot measure elections. It is noteworthy that it is not the *fact* of a danger but the *potential* of a danger that alone generates the *compelling* interest found by the majority. It will readily be seen that this wholly untested political hypothesis is not based upon any record but rather upon the opinions and conclusions of 'commentators on our political scene,' 'a political scientist,' or a 'student of the California initiative process.' (*Ante,* p. .... [maj. opn. at 828, Appendix A at 11-13). Moreover, the 'commentators' and 'students' have hardly been unanimous in their support of contribution

> limitations to ballot measures. (For contrary views, see generally, Note, *supra*, 86 Yale L.J. 953; Ely, *The Supreme Court, 1977 Term* (1978) 92 Harv. L.Rev. 5, 163; Redish, *Campaign Spending Laws and the First Amendment* (1971) 46 N.Y.U. L.Rev. 900; Clagett & Bolton, *Buckley v. Valeo* (1976) 29 Vand. L.Rev. 1327.

*Id.* at 835, Appendix A at 23 (emphasis in original).

The dissent below further stated:

> The study of a Colorado ballot measure, or a 16-year-old analysis which concludes that the California initiative and referendum process is 'largely a tool of interest groups' would make interesting background material for a political debate. Unquestioned and unverified, however, these opinions do not constitute the hard evidentiary support needed to demonstrate a state's present and *compelling interest* in the suppression of the multiple First Amendment rights of our California citizens. The existence of such a threat and its potential are wholly undocumented.

*Id.* at 835, Appendix A at 24 (emphasis in original).

*First National Bank of Boston v. Bellotti* struck down a Massachusetts law which prohibited corporate contributions and expenditures with respect to issue-related campaigns. In attempting to establish the existence of a compelling state interest to justify those restrictions, Massachusetts asserted as compelling, "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government." *First National Bank of Boston v. Bellotti,* 435 U.S. at 787. Rejecting this argument, this Court stated:

> Appellee advances a number of arguments in support of his view that these interests are endangered

> by corporate participation in discussion of a referendum issue. They hinge upon the assumption that such participation would exert an undue influence on the outcome of a referendum vote, and—in the end—destroy the confidence of the people in the democratic process and the integrity of government. According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. *If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration.* Cf. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). But there has been no showing that the relative voice of corporations has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government. *Cf. Wood v. Georgia*, 370 U.S. 375, 388 (1962).

*Id.* at 789-90 (emphasis added, footnote omitted).

The California Supreme Court simply disregarded this central reasoning of *Bellotti* when, despite the lack of any record or legislative findings, it concluded that large contributors "potentially" corrupt or pervert the referendum and initiative processes and that the prevention of such a potential evil was a compelling governmental interest sufficient to uphold section 602. Moreover the Court below did not say that large contributions were in fact "corrupting" the initiative process, or that such corruption was "threatened imminently;" the sole basis for the Court's finding of a compelling interest was the "potential" of corruption at some undefined date in the future.

The majority below further erroneously concluded that candidate and ballot measure elections "differ very little"

and that in both types of elections, large contributors have "equivalent potential to pervert the purpose of the initiative and more generally corrupt the electoral process." 27 Cal. 3d at 826, Appendix A at 9. In so declaring, the majority below ignored another basic premise of *Bellotti:*

> Nor are appellee's arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections, e.g., *United States v. Automobile Workers, supra; United States v. CIO, supra,* simply is not present in a popular vote on a public issue.

*First National Bank of Boston v. Bellotti,* 435 U.S. at 790 (footnote omitted).

Elaborating in a footnote, Justice Powell stated:

> The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. . . . The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.

*Id.* at 788, n. 26 (citations omitted).

The California Supreme Court opinion also failed to square with vital portions of this Court's decision in *Buckley v. Valeo,* which struck down expenditure limits and upheld limits on contributions to *candidates'* campaigns. In *Buckley,* three governmental interests were advanced by

Mr. Valeo to justify the restrictions: (a) the prevention of corruption and the appearance of corruption created by the real or imagined influence of large contributors on candidates and officeholders; (b) quieting the voice of the affluent in the election process and thereby equalizing the relative ability of all citizens to affect the outcome of elections; and (c) braking the skyrocketing cost of election campaigns and opening the political system to candidates without access to large amounts of money. *Buckley v. Valeo,* 424 U.S. at 25-26. While this Court upheld the limit on contributions to candidates' campaigns, it clearly articulated its reasoning in a way that leaves no doubt that *Buckley* does not apply to contribution limits in issue-related elections:

> To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.
>
> Of almost equal concern as the danger of actual *quid pro quo* arrangements is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.

*Id.* at 26-27 (footnote omitted).

In striking down expenditure limitations, *Buckley* rejected the other interests advanced:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates im-

> posed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan, supra*, at 266, 269, quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945), and *Roth v. United States*, 354 U.S., at 484.

*Id.* at 48-49.

> [T]he mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending and the resulting limitation on the scope of federal campaigns. The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.

*Id.* at 57 (footnote omitted).

By failing to distinguish between candidate and ballot measure elections, the Court below disregarded a basic premise of *Buckley*. And by postulating that "the domination of these [electoral] processes by large contributors leaves other citizens with a stilled voice . . .," 27 Cal.3d at 826-27, Appendix A at 9-10, the majority below ignored another basic precept of *Bellotti* and *Buckley*, that it is

unconstitutional to restrict the speech of some in order to enhance the relative voice of others.

The decision of the majority of the California Supreme Court also conflicts with the decisions of several of the Circuits. *Schwartz v. Romnes*, 495 F.2d 844 (2d Cir. 1974), in addressing the "corruption/appearance of corruption" justification for limits on contributions to ballot measure committees, made these relevant observations:

> Whatever the justification for prohibiting contributions that are prone to create political debts, it largely evaporates when the object of prohibition is not contributions to a candidate or party, but contributions to a public referendum. *The spectre of a political debt created by a contribution to a referendum campaign is too distant to warrant this further encroachment on First Amendment rights.*

*Id.* at 852-53 (emphasis added, footnote omitted).

In striking down a portion of a Montana statute that prohibited corporate contributions in support of or opposition to ballot issues, the Ninth Circuit, relying on *Bellotti*, stated:

> The state interest in preventing corruption of officials, which provided the basis for the Supreme Court's finding in *Buckley* that restrictions could permissibly be placed on contributions, is not at issue here. When corporations seek to influence the electorate and not an individual candidate or party, no such state interest exists because corporate activities cannot create political debts of the kind contemplated in *Buckley*. That a corporation's involvement may influence the vote provides no adequate reason to suppress corporate speech.

*C & C Plywood Corp. v. Hanson*, 583 F.2d 421, 425 (9th Cir. 1978) (citation omitted).

Justice Richardson's dissent below provides an apt summary:

> I wholly disagree with the premise underlying the majority's assumptions which betrays an over-protective 'father knows best' syndrome. I find nothing in either Constitution, federal or state, or in law or policy which permits a city council to quantify or measure out the amount of information or misinformation which the electorate may receive in a ballot measure campaign. . . .
>
> The long arm of government does not belong in this arena where the direct voice of the people is heard through the initiative or referendum. Where the clash of contesting ideas, opinions and arguments in many forms culminates in the ultimate expression of the people's will, through an issues election, let the people be the sole judge. Let them separate for themselves the wheat of truth from the chaff of falsehood. They need no self-appointed protective guardian to measure for them the amount of public issue information, misinformation or argument which is to be available for their consideration. Justice Jackson put it very well in his concurring opinion in *Thomas v. Collins* (1945) 323 U.S. 516, 545: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind. . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."

27 Cal.3d at 838-839, Appendix A at 28-29.

**4. The August 7, 1980, California Supreme Court Decision Directly Conflicts With A Unanimous Decision of the United States Court of Appeals For the Fifth Circuit, Filed July 11, 1980**

In its opinion in the consolidated action, *Let's Help Florida v. McCrary*, 621 F.2d 195 (1980),[5] the Fifth Circuit framed the issue thusly: "In these consolidated cases we must decide whether Florida statutes that restrict the size of contributions to a single political committee in a referendum election violate the first amendment rights of persons who want to contribute more than the maximum amount allowed by the statutes." *Id.* at 197, Appendix H at 90. The Florida statute in question limited contributions to committees for or against issues on the state ballot to $3,000, and to committees for or against issues on county ballots to $1,000. The Fifth Circuit unanimously held that the contribution limits were unconstitutional restrictions on First Amendment rights of speech and association, and were not justified by any compelling state interest.

> The state's interest in preventing the actual or apparent corruption of candidates, which the Supreme Court found so compelling in *Buckley*, does not justify restrictions upon political contributions in referendum elections. When people elect a candidate, they choose someone to whom they can delegate their political decisionmaking. The people's need to prevent large contributors from improperly influencing this representative decisionmaker is critical. In contrast, when people vote on a referendum proposal, they directly decide the pertinent political issue for themselves. Large contributions for publicity by one group or another do not influence the political decisionmakers —in this case, the voters themselves—except in a

[5]For convenience, the Fifth Circuit's Opinion appears as Appendix H.

> manner protected by the first amendment. * * * With regard to referendum elections, appellants cannot justify the statutory restrictions upon political contributions as a means for preventing corruption.

*Let's Help Florida v. McCrary*, 621 F.2d at 199-200, Appendix H at 96-98.

There is a direct and irresolvable conflict between the decisions, filed less than thirty (30) days apart, of the California Supreme Court and the United States Court of Appeals for the Fifth Circuit.

**THE QUESTIONS PRESENTED ARE SUBSTANTIAL**

In response to the 1972 election and the ensuing Watergate controversy, a multitude of laws were enacted at federal, state and local levels to regulate the electoral processes. Unfortunately, the rush to legislate was not always accompanied with due regard for the protection of the fundamental rights of speech and association. *Buckley* and its progeny were the result. Perhaps the most significant remaining issue to be resolved is the one presented by this appeal: the validity of limits on the amount of money a person or group can contribute to a ballot measure or issue-related campaign committee. There is little doubt that such contribution limits strike to the heart of First Amendment rights of all those affected.

Contribution limits have been enacted not only in the City of Berkeley and the State of Florida, but also in the following California cities and/or counties: City of Cypress ($100 per ballot measure); City of Del Mar ($20 per ballot measure); City of Fremont ($250 per ballot measure); City of Newport Beach ($200 per ballot measure); City of San Diego ($250 per ballot measure); San Diego

County ($250 per ballot measure); City and County of San Francisco ($500 per ballot measure); City of San Juan Capistrano ($100 per ballot measure); Santa Cruz County ($500 per ballot measure); and the City of Santa Monica ($.02 times the voting age population per measure). Currently a bill is pending in the California Legislature to enact similar contribution limits with respect to statewide elections.

Given the widespread presence of legislation limiting contributions to ballot measure campaigns, their impact on the exercise of fundamental rights, and the diametrically opposed decisions of the California Supreme Court and the United States Court of Appeals for the Fifth Circuit, the issues presented are substantial and merit this Court's plenary review and adjudication.

## CONCLUSION

For the foregoing reasons, it is requested that probable jurisdiction be noted.

Respectfully submitted,

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